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No. 89-724

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STATE OF SOUTH DAKOTA, ET AL.,

Petitioners,

v.

KANSAS CITY SOUTHERN RAILWAY COMPANY, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF NINE STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTRODUCTION

The States of Arkansas, Connecticut, Maine, Maryland, North Dakota, Texas, Utah, West Virginia, and Wyoming (hereinafter "Amici States") submit this brief in support of the State of South Dakota's Petition for Writ of Certiorari.

INTEREST OF THE AMICI STATES

The Attorneys General of the Amici States have a strong interest in interpreting the antitrust laws consistent with sound policy, congressional intent and the prior decisions of this Court. The Attorneys General of the Amici States are the chief law enforcement officers of their states, and many are charged with the duty of enforcing state antitrust laws. The state antitrust laws by statute or court decision are often interpreted in conformity with federal law.[1] The Attorneys General also represent their states and political subdivisions in state and federal antitrust actions for damages and

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[1] See, e.g., Tex. Bus. & Com. Code § 15.04 (1989); Connecticut v. Exxon Corp., 1987-1 Trade Cas. CCH ¶ 67,579 (Conn. Super. Ct. 1987).

injunctive relief.[2] In their capacity as parens patriae, they are authorized to bring state and federal actions on behalf of the citizens of their states.[3] Thus, the Court's interpretation in this case will not only directly affect the Amici States' ability to bring antitrust actions in federal court, but will have an impact far beyond the questions of federal law presented.

South Dakota made a sovereign decision to engage in a commercial transaction with one of its most precious resources, water, to enhance water development and delivery of quality water to its citizens. Similarly, many Amici States are involved in a variety

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[2] Georgia v. Evans, 316 U.S. 159 (1942).

[3] 15 U.S.C. § 15(c). See also Georgia v. Pennsylvania Railroad Co., 324 U.S. 439 (1945) (common law parens patriae authority).

of commercial ventures for the benefits of their citizens.[4]

The resolution of whether a sovereign state has standing under the federal anti-trust laws in commercial ventures like South Dakota's is of compelling interest to the Amici States.

The Amici States support the State of South Dakota's contention that the Eighth Circuit's decision in South Dakota v. Kansas City Southern[5] artificially narrows a state's right to pursue actions under Section 4 of the Clayton Act. The Amici States also support South Dakota's contention that the

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[4] See, e.g., NDCC § 6-09-01 (authorizing the Bank of North Dakota) and NDCC § 54-18-02 (authorizing the North Dakota Mill and Elevator).

[5] South Dakota v. Kansas City Southern Industries, 880 F.2d 40 (8th Cir. 1989), petition for cert. filed, (U.S. Nov. 3, 1989), (No. 89-724).

Eighth Circuit decision concerning the sham exception to the Noerr-Pennington doctrine imposes an almost unattainable burden upon a plaintiff to establish a basis of liability for anticompetitive petitioning conduct before courts and administrative agencies.

SUMMARY OF ARGUMENT

1. The Eighth Circuit held that South Dakota lacked the ability to bring an action under Section 4 of the Clayton Act because it was only a "supplier." This holding is contrary to the intent of Congress, inconsistent with this Court's prior decisions and improperly prevents persons who are not direct competitors and purchasers in a restrained market from recovering treble damages for injuries they have suffered at the hands of antitrust violators.

2. The Eighth Circuit improperly applied the sham exception to the Noerr-Pennington doctrine to immunize a

pattern of anticompetitive petitioning conduct as a matter of law based upon partial motivation to prevail on the merits and limited success. This is contrary to this Court's prior decisions and creates an impossible burden of proof. The Eighth Circuit decision also conflicts with holdings of other circuits, including In re Burlington Northern, Inc., infra, a case involving the same petitioning conduct.

ARGUMENT

I

THE CAPACITY TO BRING AN ACTION UNDER § 4 OF THE CLAYTON ACT IS NOT LIMITED TO DIRECT COMPETITORS AND PURCHASERS IN A RESTRAINED MARKET.

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides a treble damage remedy to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . ." The Eighth Circuit's decision severely weakens this

private right of action. The decision effectively prohibits participants, other than direct competitors and purchasers in a restrained market, from pursuing actions under § 4 to enforce the antitrust laws and seek relief from injuries suffered. Such a restrictive interpretation of the availability of this antitrust remedy is inconsistent with the intent of Congress.

This Court has stated:

> "[o]n its face, § 4 contains little in the way of restrictive language." And the lack of restrictive language reflects Congress' "expansive remedial purpose" in enacting § 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations.

Blue Shield of Virginia v. McCready, 457 U.S. 465, 472 (1982), (quoting from Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979)).

Given this expression of congressional intent, this Court has refused to engraft artificial limitations on this remedy. The Court has recognized that § 4 is not confined to consumers, to purchasers, to competitors, or to sellers. It is comprehensive in its terms and coverage, protecting all who are victims of the forbidden practices. McCready, 457 U.S. at 472.

In this case, it is clear that South Dakota, as a participant in the coal transportation market, was acting in both sovereign and proprietary capacities. As such, it had greater interests to preserve competition and pursue antitrust violations than all other private participants, except Energy Transportation System Inc., the prospective direct competitor. South Dakota's sovereign acts should strengthen its argument for antitrust standing. This issue

of sovereignty was totally ignored by the Eighth Circuit.

Consistent with the Court's refusal to engraft artificial limitations, this Court in Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 535-536 (1983) rejected the lower courts' application of various black-letter rules of law and labels in determining a party's ability to pursue an action under § 4. The Court went on to hold that the determination of whether a person could avail himself of this remedy required an analysis of the factors set forth in previous antitrust decisions. Associated General, 459 U.S. at 536-545. The factors to be weighed are:

1. The causal connection between the alleged antitrust violation and the harm to the Plaintiff;

2. The existence of improper motive;

3. Whether the injury was the type that Congress sought to redress with the antitrust laws;

4. The directness of the connection between the injury and the alleged restraint in the relevant markets;

5. The speculative nature of the damages; and

6. The risk of duplicative recoveries or complex apportionment of damages.

Id. at 537-545.

When the Eighth Circuit denied South Dakota's standing, it not only decided the antitrust standing issue in a manner contrary to congressional intent, but it also misapplied clear precedent from this Court. Rather than applying the appropriate factors, the Eighth Circuit relied upon its determination that South Dakota was an ordinary supplier and, as such, could not have the ability to pursue a § 4 action. South Dakota v. Kansas City Southern, 880 F.2d at 46-48.

Misapplication of antitrust standing analysis is not limited to the Eighth Circuit. Other circuits have used labels and black-letter rules to restrict the availability of the § 4 remedy.[6]

By granting South Dakota's Petition for Certiorari, this Court would have an opportunity to correct this misapplication of precedent. The Court would also be able to analyze the availability of § 4 in circumstances in which a party performs sovereign and proprietary functions.

- II

THE EIGHTH CIRCUIT DECISION IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS AND CONSTITUTES AN UNWARRANTED EXPANSION OF IMMUNITY UNDER THE NOERR-PENNINGTON DOCTRINE.

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[6] See, e.g., Eagle v. Star-Kist Foods, Inc., 812 F.2d 538 (9th Cir. 1987); Gregory Marketing Corp. v. Wakefern Food Corp., 787 F.2d 92 (3d Cir.), cert. denied, 479 U.S. 821 (1986); Bell v. Dow Chemical Co., 847 F.2d 1179 (5th Cir. 1988).

The extent that the petitioning of government officials is protected from liability is one of great controversy. The protection provided for petitioning activity, which is discussed under the Noerr-Pennington doctrine, applies to many actions besides antitrust.[7] It embodies both statutory and constitutional considerations.

The scope of the Noerr-Pennington doctrine is a center of heated debate. In an apparent effort to provide guidance to lower courts, this Court in Allied Tube & Conduit Corp. v. Indian Head, Inc., ___ U.S. ___, 108 S.Ct. 1931 (1988), addressed the

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[7]The doctrine is used to describe this Court's rulings in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) and United Mine Workers of America v. Pennington, 381 U.S. 657 (1965), that certain petitioning of government officials is immune from scrutiny under the antitrust laws and other laws regulating commercial behavior.

applicability of the Noerr-Pennington doctrine in a "legislative" setting. There, the Court determined that the immunity provided by the doctrine is not absolute and depends upon the "source, context and nature of the anticompetitive restraint at issue." Allied Tube, 108 S.Ct. at 1937. There are no talismanic indicators of immunity; all circumstances surrounding the petitioning activity must be examined.

Despite this guidance, the controversy over the scope of Noerr-Pennington doctrine continues. An area of great dispute is the applicability of the sham exception. Under this exception, private action that is not generally aimed at procuring favorable government action is a mere sham that cannot be deemed a valid effort to influence government action. Such activity is not protected from immunity. See Allied Tube, 108 S.Ct. at 1937 n.4. Although this Court has addressed

the issue of what constitutes sham in several decisions, it has not reviewed a sham petitioning action following a jury verdict.[8] Lower courts have developed varying legal theories on what constitutes sham petitioning activity. This has resulted in conflicting determinations of when petitioning activity is a sham and subject to liability.[9]

There is no clearer evidence of conflicting determinations than the Eighth

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[8] See California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983).

[9] See, e.g., Energy Conservation, Inc. v. Heliodyne, Inc., 698 F.2d 386 (9th Cir. 1983); Coastal States Marketing, Inc. v. Hunt, 694 F.2d 1358 (5th Cir. 1983) (conflicting theories on motivation); Columbia Pictures Industries, Inc. v. Redd Horne, Inc., 749 F.2d 154 (3d Cir. 1984); Premier Electrical Construction Co. v. National Electrical Contractors Ass'n, Inc., 814 F.2d 358 (7th Cir. 1987) (conflicting theories on the conclusiveness of success).

Circuit's decision in this case and the Fifth Circuit's decision in In re Burlington Northern, Inc., 822 F.2d 518 (5th Cir. 1987), cert. denied, 484 U.S. 1007 (1988). In South Dakota v. Kansas City Southern, the Eighth Circuit determined as a matter of law, contrary to the jury's finding, that the petitioning conduct was not a sham and protected from liability. The lower court concluded that, despite the presence of a comprehensive scheme to utilize state and federal courts and administrative agencies for anticompetitive purposes, Kansas City Southern was protected due to the partial success in the Andrews litigation[10] and that Kansas City Southern was motivated at least

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[10] Missouri v. Andrews, 586 F. Supp. 1268 (D. Neb. 1984), aff'd, 787 F.2d 270 (8th Cir. 1986), aff'd sub nom. ETSI Pipeline Project v. Missouri, 484 U.S. 495 (1988).

in part by a "desire to prevail on the merits." 880 F.2d at 50-54. In contrast, the Fifth Circuit, in reviewing the identical petitioning activity, determined that this activity could constitute a sham given the lack of success and the intent to cause direct injury through delay and uncertainty. In re Burlington Northern, Inc., 822 F.2d at 526-533.

The Attorneys General of the Amici States have compelling interests to prevent unwarranted expansion of immunity from anticompetitive conduct and to prevent their judicial and administrative processes from being used to inflict commercial injury through delay and uncertainty.

The Eighth Circuit decision inhibits these interests. Through South Dakota v. Kansas City Southern, the Eighth Circuit imposes what is an almost impossible burden on a plaintiff to establish sham petitioning

activity. The Eighth Circuit rejected the holding of other circuits that mixed motive petitioning activity can constitute a sham despite success on the merits. See, e.g., In re Burlington Northern, Inc., supra; Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466 (7th Cir. 1982), cert. denied, 461 U.S. 958 (1983).

The granting of South Dakota's Petition for Certiorari will allow this Court to address what constitutes sham activity in the context of a jury issue. Judicial review by this Court is necessary to establish consistency among lower courts concerning this judicially created doctrine.

CONCLUSION

For the foregoing reasons, the Amici States urge this Court to grant the State of

South Dakota's Petition for Writ of Certiorari.

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